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No. 84-1784

In The
Supreme Court of the United States
October Term, 1984

JACK GRYNBERG, JACK GRYNBERG AND ASSOCIATES, and CELESTE GRYNBERG,

Petitioners,

v.

PAUL DANZIG, LOUIS DEGEN, ROBERT RUSSELL, and CARL ZWERNER,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition omits several critical substantive and procedural facts which are material to the issues raised before this Court. Specifically, the Petition does not set forth that Petitioners failed to raise *any* of the issues raised before this Court before the trial court prior to trial and adverse judgment.

Petitioners Jack and Celeste Grynberg and Jack Grynberg & Associates ("Grynbergs"), defendants in the action, seek reversal of a judgment rendered in favor of the plaintiff class by the trial court sitting without jury. The action was based upon the alleged fraudulent acts of Grynbergs in soliciting the members of the plaintiff class to subscribe to a prospective oil and gas drilling program known as the Greater Green River Basin Drilling Program 72-73 ("GGRB"), and to participate in a subsequent additional "assessment." The trial court found that Grynbergs committed acts of intentional fraud, through the use of common written misrepresentations disseminated to all members of the class, to induce the purchases of limited partnership interests in GGRB. The court ordered rescission of the partnership subscriptions executed by the members of the class and restitution of all sums paid as initial subscriptions and pursuant to a subsequent assessment levied under a purported amendment to the agreement, together with compensatory damages, against all defendants. The court further awarded punitive damages against Jack Grynberg (only), in the sum of $431,081.06, *pro rata* to the members of the class.

GGRB was formed in 1971 as an oil and gas drilling program. Jack Grynberg acted as general partner through

Jack Grynberg & Associates, a sole proprietorship. Limited partnership interests were sold in several states. The program was registered in the State of California. Grynberg sold more interests in the State of California than in any other state: Seventeen of the original 52 purchasers of interests, or 32%, were residents of the State of California[1] (F.F.[2] No. 69-70 and Exhibit A to the judgment; Ap.[3] pp. A32, A41-42); the next largest number of original purchasers by state of residence was six from Pennsylvania and Texas and four from Colorado. (F.F. No. 69, 70; Ap. pp. A32, A41-42.)

In March, 1975, five[4] individuals filed the subject action on their own behalf and on behalf of all limited partners of GGRB. The crux of the action was the contribution to be made to the partnership by Grynbergs. Under the terms of the partnership agreement, the limited partners contributed $4,000,000 as the capitalization of the partnership and received an undivided 50% interest in the partnership and in the assets thereof, *pro rata* upon termination of the partnership. Grynbergs received the remaining 50% interest.

The plaintiff class contended, *inter alia*, that Grynbergs had represented that they would contribute to the partnership, as their capital contribution, approximately

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[1] The numbers of purchasers per state set forth in the Petition do not coincide with the findings made by the trial court.

[2] Findings of Fact of the trial court will be cited as "F.F."

[3] The Appendix to Grynbergs' Petition for Certiorari will be cited as "Ap. p. A—."

[4] One of the representative plaintiffs died prior to trial and his estate was substituted as a member of the class. Another representative plaintiff, Robert Russell, died during the appeal process.

200,000 acres of oil and gas leases owned by Jack and Celeste Grynberg, individually, and that upon termination of the partnership (defined as expenditure of the entire monetary capital), those leases would be distributed to the partners, *pro rata*, so that the limited partners would continue to hold a 50% undivided interest. However, upon termination of GGRB, Grynbergs asserted that the limited partners had a continuing interest only in the few leases which had been drilled and were producing; they asserted that all of the other leases (which had been maintained at the expense of the partnership during its term) reverted to them free of any claim of the partnership or the limited partners. The plaintiff class therefore sought, *inter alia*, a determination that the subject leases were assets of the partnership and did not revert to the Grynbergs, and that the limited partners held a continuing 50% interest in the leases. The plaintiff class also sought damages for various breaches of fiduciary duty by Grynbergs, as well as for their misrepresentations that the leases would remain assets of the partnership and would not revert to them upon termination of the partnership. The plaintiff class also sought rescission of the 1974 assessment levied pursuant to a purported amendment to the partnership agreement, under which various limited partners had contributed an additional $410,810.69; or, alternatively, damages in the amount of those contributions.

Grynbergs filed preliminary motions in which Celeste Grynberg challenged the jurisdiction of the California courts *as to her*, and Grynbergs collectively sought dismissal of the action on the grounds of inconvenient forum. Both motions were denied, and the appellate court denied petitions for writs of mandate. All defendants then answered.

No defendant raised any claim or contention that the California courts lacked jurisdiction over any member of the class by answer, or otherwise, in the trial court.

In December, 1975, the representative plaintiffs moved for class certification. Grynbergs' response to the motion raised no jurisdictional objection. After hearing, the trial court ordered the action certified as a class action on all causes of action. Notice in the form approved by the court was mailed to all members of the class; each member of the class was expressly notified of the right to "opt out" of the action. Grynbergs raised no objection to the form of the notice. No member of the class elected to opt out. From that point forward, the suit proceeded as a class action.

During the course of discovery, Grynbergs submitted interrogatories directed to all of the unnamed class members. *Each member of the class filed verified answers to those interrogatories prior to trial.*

In October, 1979, the plaintiff class moved to amend the complaint to add additional causes of action by which the class sought rescission of the original partnership subscriptions or damages in the amount of the original subscription payments, based upon the common material fraudulent misrepresentations and non-disclosures of Grynbergs. The amendment was sought, among other reasons, because Grynbergs had been managing and operating the disputed leases solely for their own account and benefit for over five years since the termination of the partnership; they had therefore obtained the income and benefits from many of the leases and had abandoned or permitted termination of many others, so that allocation of an interest in those leases to the limited partners

would have been a useless act. The proposed causes of action were based entirely upon the facts previously alleged in the complaint, and merely sought alternative forms of relief. The trial court permitted the amendment, ruling that it presented no new factual or legal issue. Grynbergs filed their answer to the amendment; they again failed to raise any defense or objection with regard to the jurisdiction of the court over the class members or the nature or form of the notice which had been sent to the members of the class. Grynbergs did not seek to decertify or recertify the class based upon the amendment.

The action proceeded to trial in March, 1980, *as a class action* without objection by Grynbergs; they raised no claim that the amendment had in any way impaired or affected the original class certification or notice to the class, nor did they contend that the original notice had been rendered inadequate or insufficient because of the amendment.

Nor did Grynbergs raise any issue before the trial court that the law of the states of residence of the respective class members was the proper choice of law to be applied. The only choice of law urged by Grynbergs before the trial court was that the law of the State of Colorado, as *their* place of residence, rather than that of California, should be applied. That choice of law issue was argued in pre-trial briefs, and the substantive issues were argued by all parties under both California and Colorado law in the extensive post-trial briefs. No other choice of law issue was submitted to the trial court.

In September, 1980, the trial court issued his notice of intended decision. The trial court found, among other

matters, that Jack Grynberg had distributed a series of lengthy and complex prospectuses of identical appearance to the members of the class without disclosing to them that material changes had been made in the paragraph relating to the contribution of the leases by the Grynbergs to the partnership after distribution of the original prospectus, and then had distributed written summaries with the final versions of the prospectus which intentionally repeated the language of the *original* prospectus (in large, capitalized letters) that the leases would be contributed to the partnership, despite the fact that Grynbergs had been instructed by the SEC to delete that language from the prospectus because it was "misleading" and would cause the investors to believe that the leases were to become assets of the partnership which would not revert to Grynbergs upon termination. The court ordered rescission of the partnership subscriptions as well as of the assessments made under the purported amendment to the agreement and restoration of all sums paid by each member of the class, together with compensatory and punitive damages. Findings of fact and conclusions of law were submitted, argued and filed, and judgment was entered on December 18, 1980. A modification of judgment was entered *nunc pro tunc* on February 5, 1981, for the sole purpose of curing the inadvertent omission of Celeste Grynberg's name from the caption of the judgment form.

After entry of judgment, Grynbergs filed motions for new trial.[5] *Those motions raised the claims of inadequate*

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[5] Grynbergs state that their motion for new trial was filed prior to the *Modification* of judgment, and thus "timely" raised the choice of law and notice issues, implying that the Modifi-

(Continued on following page)

notice to the class and failure to apply the law of the states of residence of the individual class members for the first time.[6] The trial court denied the motions on all grounds. Grynbergs then filed their notice of appeal, and the parties filed their respective briefs on appeal. *Several months after the appellate briefs had been filed,* Grynbergs filed a motion before the appellate court to dismiss the action as to the non-resident class members, *contending for the first time that the California courts did not have jurisdiction over the non-resident class members.* The Court of Appeal denied the motion without opinion and without prejudice to reconsideration of the issue when the appeal in chief was heard. After oral argument, the Court of Appeal affirmed the judgment of the trial court; it did not reconsider the jurisdictional motion. The California Supreme Court denied a petition for hearing on all grounds.

After judgment was entered in California, the judgment was duly established in Colorado and Wyoming, and

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(Continued from previous page)

cation had a substantive effect upon the judgment. But even if, *arguendo,* such issues could properly be raised after trial and announcement of decision but prior to entry of judgment, judgment had been entered in this action prior to filing the motions for new trial; such motions are not made under California procedure until after judgment has been formally entered. The Modification of the judgment, which was entered *nunc pro tunc,* was merely technical in nature to cure the inadvertent omission of Celeste Grynberg's name from the caption of the action, although the body of the judgment recited the liability of all defendants. The Modification was requested when the clerk of the Colorado court refused to issue execution against Celeste after the subject judgment was established in Colorado because her name was not contained in the caption.

[6] Although Grynbergs' post-trial brief was 208 pages, neither these issues, nor the issue of jurisdiction, was raised.

execution issued against Grynbergs since they failed to file an appeal bond. Grynbergs then filed a Chapter XI proceeding in the Bankruptcy Court in Denver, Colorado. Each member of the class, individually, filed a verified proof of claim in that bankruptcy with regard to each person's interest in the judgment.

I.

THERE IS NO BASIS FOR GRANTING THE WRIT IN THIS ACTION

1. The within action does not present constitutional questions relating to jurisdiction, nor does it present issues similar to those raised in *Phillips Petroleum Co. v. Shutts.*

a. Grynbergs did not timely raise the jurisdictional issue. The issue may not be raised for the first time on appeal.

b. Each of the class members filed verified answers to interrogatories prior to trial, thereby voluntarily subjecting themselves to the jurisdiction of the California courts.

c. Each of the class members acknowledged and ratified the judgment after it was entered, and prior to Grynbergs' motion to dismiss.

2. Grynbergs failed to raise any claim that the law of the states of residence of the class members should be applied to the claims of those class members prior to judgment; the claim, even if meritorious, was therefore waived.

3. Grynbergs failed to assert any objection to the content of the notice sent to the members of the class prior

to judgment; the claim, even if meritorious, was therefore waived.

II.

THE SUBJECT ACTION DOES NOT RAISE ISSUES SIMILAR TO PHILLIPS PETROLEUM CO. V. SHUTTS; THERE WAS NO DENIAL OF DUE PROCESS TO THE NON-RESIDENT CLASS MEMBERS

A.

Grynbergs Did Not Timely Raise The Jurisdictional Issue Before The Trial Court

Even if there be an issue as to the right of a state court to assert jurisdiction over non-resident class plaintiffs, the defendant must timely raise the objection before the trial court. The issue must be raised at the first opportunity, generally in the defendant's first motion or responsive pleading. (*Insurance Corp. v. Compagnie Des Bauxites* (1981) 456 U.S. 694, 704; *cf.* F.R.C.P. 12(h) (1).) As Mr. Miller, one of the counsel for Grynbergs on the Petition, stated to this Court during oral argument in *Phillips Petroleum Co. v. Shutts*:

> "We were obliged under the normal rules of assertion of threshold defenses to make the jurisdictional objection prior to answer and litigate it, as we did, in a fully adversarial context." (O.T.[7] p. 9.)

In *Phillips Petroleum Co.*, the defendants did raise the jurisdictional issue at the procedural stage and also sought interim appellate review. They fully litigated the issue before the trial court. Grynbergs failed to meet

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[7] The Official Transcript of Proceedings, *Phillips Petroleum Co. v. Shutts*, Docket No. 84-233, oral argument on February 25, 1985, will be cited "O.T."

that obligation; they failed to either raise the defense of lack of jurisdiction or to litigate it before the trial court. They thus precluded the members of the plaintiff class from responding, or from taking any action to meet the issue. It is not unreasonable to suggest that had the members of the plaintiff class been asked to affirmatively opt in rather than being given the opportunity to opt out, or had they been asked to take any other specific action to acknowledge the jurisdiction of the California courts, they would have done so; each class member responded to interrogatories submitted by defendants, which required more effort and more commitment to the lawsuit than would the submission of an opt-in form to the court. But no such demand or objection was made by Grynbergs prior to judgment. The action of defendants in withholding the jurisdictional claim prior to trial and judgment precluded the members of the class from taking whatever action defendants contended should have been taken by them.

If a defendant does have standing to contest the jurisdiction of the forum over members of the plaintiff class, that standing should no longer exist after trial on the merits. The claim of a defendant that members of the plaintiff class have been denied due process rings very hollow after a judgment has been rendered in favor of the class, and the members of the class seek the benefits of that judgment. The due process right which Grynbergs seek to assert is concededly that *of the class members.* Since it is their right alone, *they* have the right to waive it. (*Insurance Corp. v. Compagnie Des Bauxites, supra,* 456 U.S. 694.) They have done so, both by submitting answers to interrogatories and by filing bankruptcy claims based upon their interests in the judgment; and they would

file any further document reqquired of them to affirm the jurisdiction of the California court. If this Court were to hold that the defendant can assert the jurisdictional defense, or for that matter any of the issues presented by this Petition, after trial on the merits and an adverse determination, thereby vitiating the judgment, it is *that* result which would deny due process to the members of the plaintiff class. This case presents a stark illustration of the consequences of such post-trial procedures. This case has been in litigation for ten years; Grynbergs delayed trial for almost five years, and then delayed an appellate hearing for four years by virtue of their bankruptcy proceedings. Two of the original representative plaintiffs have died; members of the class have also died during the course of these judicial proceedings. Even as to the surviving class members, the facts have grown stale and witnesses unavailable. It is for this very reason that such objections are required to be made in the trial court, so that the opposing party is at least afforded the opportunity to meet and cure the objection during the course of the trial proceedings. Failure to timely raise the objection constitutes a waiver.

Objections to personal jurisdiction may be waived, or a defendant may be estopped from asserting the issue. (*Insurance Corp. v. Compagnie Des Bauxites, supra,* 456 U.S. at pp. 704-705.) Grynbergs, by failing to raise the issue prior to judgment, have waived the issue and are estopped to assert it. The issue in this action is that simple, Grynbergs' argument notwithstanding. As this Court stated in *Insurance Corp. v. Compagnie Des Bauxites, supra*:

> "In our view, petitioners are attempting to create a logical conundrum out of a fairly straightforward matter." (*Id.* at p. 696.)

Moreover, California was not a nominal forum with regard to the trial of this action. This is not a situation where only 1/28 of the class members were residents of the forum state. Thirty-two percent of the members of the class were California residents. No other state was as involved with this action as was California in terms of the number of residents who became investors in GGRB; defendants apparently spent more time and energy soliciting in California than in any other state. The next largest group of residents from a single state was only six people. Unless this Court were to hold that a state court may not adjudicate the claims of non-residents in a class action under any circumstances, California was the most reasonable forum for the trial of this action;[8] it was selected because of the substantial number of California residents included in the class.

It should also be noted that the appellate decision in this action is not in conflict with the decision of any other court, since the Court of Appeal denied the motion to dismiss without opinion and did not further consider the issue when it rendered its opinion on the merits. (See Ap. pp. A2-17.)

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8 Despite the size of the claims of many of the class members, the cost of maintaining the action was such that no single class member, even those with the largest interests, could have afforded to maintain it; it is doubtful that the residents of any one state, other than possibly California, could have maintained it. The post-trial declarations filed with the trial court established that the out-of-pocket non-taxable litigation costs, independent of attorneys' fees, exceeded $100,000. Most of the class members could not have proceeded to assert their claims other than through an action which encompassed all of the limited partners, a fact established by both their participation in the action and their ratification of the judgment.

B.

The Individual Class Members Voluntarily Acceded To The Jurisdiction of the California Courts

Each of the members of the class responded, individually, to interrogatories dealing with various issues in the action prior to trial; each member of the class filed verified answers. Filing answers to interrogatories is deemed to be a general appearance under California law (*Chitwood v. County of Los Angeles* (1971) 14 Cal.App.3d 522, 527, 92 Cal.Rptr. 441), and thus submission to the jurisdiction of the state's courts. A state may reasonably determine the nature of the acts which are sufficient to subject a party to the power of its courts. (*Chicago Life Ins. Co. v. Cherry* (1917) 244 U.S. 25, 29-30.)

> "An appearance may arise by implication from [a party] seeking, taking or agreeing to some steps or proceedings in the cause beneficial to himself or detrimental to [the adverse party]." (*Heleasco Seventeen, Inc. v. Drake* (D.Del. 1984) 102 F.R.D. 909, 912, citing 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2686 (1973).)

As Mr. Miller stated in his argument before this Court in *Phillips Petroleum Co. v. Shutts*:

> ". . . the constitution requires that there be an affirmative act taken by the non-resident to show a willingness to subject himself to the forum." (O.T. p. 6, 11. 11-13.)

Submission of specific, verified answers to interrogatories is an unequivocal affirmative act which shows not only a "willingness" to subject oneself to the jurisdiction of the forum, but an affirmative intent to participate in, and be bound by, the action. The members of the *Danzig* class

each *appeared* in this action; there is thus no jurisdictional issue to be raised.

Moreover, each of the members of the class appeared generally in actions initiated by Grynbergs in the State of Colorado against all members of the class, individually, after the class action was filed in California for the purpose of precluding the California action. The class members asserted the priority of the California action in those Colorado actions and requested that the actions be stayed pending judgment in the California action.[9] The indi-

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[9] Grynbergs named and served all of the limited partners in actions which were filed against all of the class members subsequent to the filing of the complaint in the instant action. (Third party complaint in *Viersen & Cochran Drilling Company v. Jack J. Grynberg, et al.*, U.S. District Court for the District of Colorado, Action No. 77-C-161, in which all of the class members appeared individually; and in *A.J. Carter, et al. v. Jack Grynberg, et al.*, State of Colorado, County of Rio Blanco, Action No. C-2117 which was stayed.) Grynbergs also named the representative plaintiffs in this action as defendants *individually and on behalf of all of the limited partners* in a series of actions which Grynbergs filed in Wyoming and Colorado, all of which were eventually stayed pending resolution of the instant action; Grynbergs did not suggest in any of those actions that service upon the class representatives did not join and bind all of the members of the class. (See, e.g., *Jack Grynberg and Associates, Jack Grynberg and Celeste Grynberg vs. Paul Danzig, et al.*: (1) State of Wyoming, District Court of Sweetwater County, Third Judicial District, Action No. 2195; (2) State of Wyoming, District Court of Sublette County, Ninth Judicial District, Action No. 2688; (3) State of Wyoming, District Court of Lincoln County, Third Judicial District, Action No. 5402; (4) State of Wyoming, District Court of Uinta County, Third Judicial District, Action No. 69-1059; (5) State of Wyoming, District Court of Fremont County, Ninth Judicial District, Action No. 18715; (6) State of Wyoming, District Court of Carbon County, Second Judicial District, Action No. 77-C-455; and (7) State of Colorado, District Court of Moffat County, Fourteenth Judicial District, Action No. 3610.)

vidual members of the class thus took every action required of them, and availed themselves of every opportunity presented, to assert their intent to be bound by the California courts *prior* to the entry of judgment in this action.

C.

Each Of The Members Of The Class Acknowledged And Ratified The Judgment

Each member of the class received notice of the judgment. No class member objected to being bound by the judgment or to the judgment itself; no class member objected to rescission of his or her interest in the partnership. Each member of the class received notice of the motion of class counsel for an award of fees, and of the right of each class member to object or to be heard on that motion. No class member objected.[10]

Each of the class members filed individual, verified claims in the Chapter XI bankruptcy proceedings of both Jack and Celeste Grynberg[11] based upon his or her interest in the judgment prior to the date upon which Grynbergs first raised the jurisdictional issue. Filing of those claims affirmed the intention of each of the class members to be bound by the judgment. (See, *e.g.* Restatement Second, Conflict of Laws, §32, and comment "d" thereto.)

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[10] One non-resident class member contacted the trial judge to be certain that the award of fees would be *pro rata* upon collection.

[11] *In re Jack Grynberg [Debtor]*, Action No. 81B00821M, Bankruptcy Court for the District of Colorado; and *In re Celeste Grynberg [Debtor]*, Action No. 81B00825M, Bankruptcy Court for the District of Colorado.

Each member of the class thus acknow'edged and ratified the judgment, thereby confirming the jurisdiction of the California courts.

III.

GRYNBERGS WAIVED ANY CLAIM THAT THE LAW OF THE STATE OF RESIDENCE OF CLASS MEMBERS CONTROLLED THEIR CLAIMS

The Court of Appeal held that Grynbergs waived any claim that the law of the states of residence of the class members was applicable to their respective claims by failing to assert such claim before proceeding to trial and judgment.

California applies the "governmental interests" test to choice of law issues; the court must first determine whether there is a true conflict between the law of California and that of another state whose law is contended to be applicable and, if there be such conflict, determine the relative interests of the contending states. (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 522 P.2d 666, 114 Cal.Rptr. 97.) Under California law, a claim that the law of a state other than the forum should apply to the issues must be raised *timely* so that the issue may be resolved by the trial court prior to submission of the issues to be tried. (*Hurtado v. Superior Court, supra; cf. Estate of Patterson* (1980) 108 Cal.App.3d 197, 207, 166 Cal.Rptr. 435.)

Grynbergs did not raise the claim that the law of the states of residence of the class members should apply to their respective claims in a timely manner before the trial court. They did not raise the claim at any time prior to

entry of judgment against them, although they *did* contend that the law of Colorado was the applicable choice of law; that contention was briefed by the parties. The claim that the law of the plaintiffs' residences was the applicable choice of law was not made until Grynbergs filed their motions for new trial. The contention was thus waived. Most federal circuits hold, as does California, that choice of law issues must be raised prior to trial or are waived. (See, *e.g., Michael-Regan Co., Inc. v. Lindell* (9th Cir. 1975) 527 F.2d 653, 656; *Pellerin Laundry Machinery Sales Company v. Reed* (8th Cir. 1962) 300 F.2d 305, 309-310; *Prudential Ins. Co. of America v. Carlson* (10th Cir. 1942) 126 F.2d 607, 611-612.)

No other procedural rule is practical. The trial judge must be given the opportunity to determine the facts under the law which the parties contend to be applicable. A party cannot be permitted to proceed through trial and to judgment arguing the law of one state and then, if he loses, urge for the first time that other laws or standards of proof should have been applied. Thus, for instance, even if, *arguendo,* Grynbergs' contention that the law of residence of the class members was applicable were correct, and even if, *arguenda,* certain of those states impose stricter standards of proof in fraud actions than does California, it is reasonable to assume that since an experienced and competent trial judge (to whom all parties stipulated under a procedure then in effect in Alameda County for complex cases) found sufficient evidence of intentional fraud to award punitive damages, he would have found sufficient evidence to meet the standard of proof of any state. But that argument should not be addressed to an appellate court; it must be made to the trial court which

is charged with the responsibility of weighing the evidence.[12] This case was decided on disputed facts with regard to the issues of misrepresentation, reliance, and justifiability of reliance, among others. The trial court weighed the evidence and determined the credibility of the witnesses. That court must be presented with the law and the standards of proof upon which the evidence is to be judged and weighed, if they differ from the law of the forum, *before* those decisions are made.[13]

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[12] Grynbergs attempt to argue the facts to suggest that the trial court erred in finding fraudulent misrepresentations and nondisclosures. However, they once again set forth only *their* version of the facts, which was rejected by the trial court in favor of the substantial evidence of fraud established by the plaintiff class.

[13] It should be noted, parenthetically, that the securities law of the respective states are irrelevant to this action. This action was not brought under the corporate securities act; it was tried in common law fraud. The issue of the effect of the failure to read the final prospectus is one of fact; in *Danzig*, the court found that Grynbergs deliberately sent misleading summaries to the purchasers with the final prospectuses, which the court found to be ambiguous, with the intention that the purchasers rely on the summaries. (See Decision of Court of Appeal, ftnt. 7, p. A10.) Similarly, it is inaccurate to suggest that the measure of damages would have differed under the law of any other state. No state court decision is cited for the proposition that any tax benefits received by the defrauded investor should be offset against the damages to which he is entitled; the law is to the contrary. (See, *e.g., Cereal By-Products Company v. Hall* (1958 Ill. App.) 147 N.E.2d 383.) This Court has expressly held, as has California, that a defendant should not be given a windfall by deducting any tax benefits received by the plaintiff from the award (*Hanover Shoe v. United States Machinery Corp.* (1968) 392 U.S. 481, 503); such an offset sanctions fraud, encourages fraudulent schemes which encompass tax implications and results in the government, rather than the defendant, bearing the cost of the defendant's fraud. (See, *e.g., Western Federal Corp. v. Erickson* (9th Cir. 1984) 739

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State courts are frequently called upon to apply the law of other jurisdictions. If the issue had been timely raised before the trial court, and if it was appropriate, subclasses of plaintiffs could have been established. But that opportunity must be afforded to the trial court.

It was not the plaintiff class which chose the law to be applied in this action. *Grynbergs* did so by failing to raise any issue as to the applicability of any law other than that of the forum until after judgment was entered against them. They therefore waived any claim that any other law was applicable to the claim of any class member.

IV.

GRYNBERGS WAIVED ANY CLAIM OF DEFICIENCY OF THE CLASS NOTICE

The Court of Appeal held that Grynbergs waived any objection to the form or content of the notice sent to the class by proceeding to trial and judgment on the merits without asserting any such objection.

Even were it to be found, *arguendo*, that the class did not receive adequate notice of the cause of action for rescission of the partnership agreement, Grynbergs waived

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F.2d 1439, 1444; *Burgess v. Premier Corp.* (9th Cir. 1984) 727 F.2d 826, 837-838; *G & R Corp. v. American Security & Trust Co.* (D.C. Cir. 1975) 523 F.2d 1164.) *Austin v. Loftsgaarden* (8th Cir. 1982) 675 F.2d 168, cited by Grynbergs, involved interpretation of the specific measure of damages provided by the Federal Securities Act; the 8th Circuit is in the minority even on that issue, but its holding is irrelevant to the measure of damages applied by any state court to a fraud action. *Salcer v. Envicon Equities Corp.* (2nd Cir. 1984) 744 F.2d 935, also cited by Grynbergs, specifically distinguished a judgment for rescission, which is the basis of the judgment in this action.

that deficiency by failing to object to the notice before trial, and failing to object to proceeding to trial upon the original notice. Grynbergs first raised the claim that a new notice should have been sent to the class upon amendment to the complaint *after* judgment; the contention was raised in their motions for new trial.[14] No such contention was raised prior to trial or prior to issuance of the court's tentative decision.

California precludes a defendant from first objecting to alleged deficiencies in pre-trial class certification or the pre-trial notice sent to class members after proceeding to trial on the merits without objection. Any such objection must be raised prior to trial or is deemed to be waived. (*Green v. Obledo* (1981) 29 Cal.3d 126, 147-148, 624 P.2d 256, 172 Cal.Rptr. 203; *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 371-374, 584 P.2d 497, 149 Cal.Rptr. 360.)

> "Without the requirement that class issues be resolved prior to a decision on the merits, a defendant could take advantage of decertification by a strategy similar to that of 'one-way intervention.' Thus he could appear to acquiesce in the plaintiff's motion to certify the class, holding back his evidence and his arguments on the issue. . . . [I]f . . . he loses on the merits, he can undo most of the damage by bringing out his evidence and arguments and mounting a belated attack on the certification order." (*Green v. Obledo, supra,* 29 Cal.3d at p. 147.)

That is exactly the strategy that Grynbergs attempted in this case after they lost on the merits. They raised no

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[14] See footnote 5, *supra*. Grynbergs first argued that the action had not been properly certified in their objections to the proposed findings of fact, submitted after the court had issued its memorandum of decision.

objection either to the pre-existing class certification or to the original notice which had been sent to the class members after the amendment to the complaint was permitted. The only defense to the class action asserted in their answer to the amendment was that there were not common misrepresentations to the class members.[15] The action was tried as a class action; Grynbergs introduced evidence regarding the investments of unnamed class members in an attempt, among other things, to establish lack of reliance by the class upon the representations that had been made. It was only after Grynbergs lost on the merits that they argued for the first time that the pre-trial notice had been insufficient; and they thus urge that this alleged pre-trial defect vitiated the trial and the judgment entered in favor of the class.

California does not bind a defendant to pre-trial certification if the evidence at trial fails to sustain the requisite elements for class adjudication; a motion to decertify after trial will lie on that ground. (*Grogan-Beall v. Ferdinand Roten Galleries, Inc.* (1982) 133 Cal.App. 3d 969, 977-978, 184 Cal.Rptr. 411.) That is *not* the issue which Grynbergs raise before this Court, since the trial court found that the evidence established the requisite elements for class adjudication and the Court of Appeal affirmed those findings. Rather, Grynbergs contend that after proceeding to trial without objection to the pre-trial notice, they may, after trial on the merits, contend for the first time that the *pre-trial* notice was inadequate and thereby obtain retrial on the merits. No authority

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[15] The trial court found to the contrary. (F.F. Nos. 25-28; Ap. p. A25.)

supports that contention; due process does not permit a party to sit mute to the prejudice of the other. Due process rights are waived if they are not asserted timely. (*Insurance Corp. v. Compagnie Des Bauxites, supra,* 456 U.S. 694; *Civil Service Employees Ins. Co. v. Superior Court, supra,* 22 Cal.3d at p. 373.) Objections to pre-trial procedures, which could be cured if timely raised, cannot be raised for the first time after trial on the merits.

The federal courts also hold that objections to pre-trial class certification proceedings may not be raised for the first time after trial. (See, *e.g., Newman v. Prior* (4th Cir. 1975) 518 F.2d 97, 100-101; *Kelley v. Metropolitan Cty. Bd. of Ed. of Nashville, Tenn.* (6th Cir. 1972) 463 F.2d 732, 743.)

A defendant has a bona fide interest in proper pre-trial certification of the class and notice to its members so that if he prevails, all members of the class will be bound; and he has a commensurate duty to assert that interest by pre-trial objection. Once the action has been tried and the class prevails, the defendant has no standing to contend that the class members were denied due process by the form of the notice they received; only the members of the class have proper standing at that point in the proceedings to complain that they did not receive adequate notice. Grynbergs cannot reasonably be heard to contend that the members of the plaintiff class were denied their due process rights because they were not adequately notified of the amendment, or were not given the right to choose a different measure of damages (assuming, *arguendo,* one were available), and should therefore be denied the benefit of a judgment in their favor which *they* wish to adopt. No member of the class has

complained of lack of notice; to the contrary, every member of the class has expressly adopted and ratified the judgment. It would be a patent denial of due process to the members of the class to now deny them the benefits of their judgment. It may be appropriate to permit a third party to assert the due process rights of those who cannot assert them, but that concept cannot be distorted to permit the losing party to attempt to defeat the rights of the prevailing parties which *they* seek to affirm by contending *they* were denied due process in obtaining their judgment interests.

Moreover, the members of the class did receive adequate notice. The amendment to the complaint was based upon the same facts, transactions and legal theories as alleged in the original complaint; it merely sought alternative forms of relief. No authority requires that new notice be sent every time an amendment is made to the pleadings once a class has been certified. *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.* (D.N.J. 1974) 64 F.R.D. 159, *aff'd.*, (3rd Cir. 1976) 530 F.2d 508, *cert. denied* 429 U.S. 828 (1976) and *Matarazzo v. Friendly Ice Cream Corp.* (E.D.N.Y. 1976) 70 F.R.D. 556, cited by Grynbergs, do not so hold. In *Zenith*, the defendant timely requested decertification prior to trial when the plaintiff amended the complaint; the amendment alleged new facts and entirely different causes of action. In *Matarazzo,* the objection to existing certification was also raised prior to trial; the amendment changed the status, and the potential burdens, of the class members.

Grynbergs raised no such objection prior to trial. They were at all times fully apprised of the identity of the class members and the amount of their respective

claims; indeed, Grynbergs had received answers to interrogatories from each of the class members prior to trial. After trial they cannot deny the members of the class the benefit of their judgment on the ground that the class members, who seek to accept the benefits of the judgment, did not have adequate notice of the amendment to the complaint.

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CONCLUSION

Grynbergs establish no ground upon which this Petition should be granted. Each of the issues raised before this Court was waived by Grynbergs' failure to assert such issue timely before the trial court.

Each of the contentions raised by Grynbergs in their Petition suffers from the same legal impairment: A defendant may not proceed to judgment without objecting to or asserting a claimed error which could be cured prior to trial, and then contend after trial and adverse judgment that the error, if any there be, can no longer be cured so that the defendant is entitled to a second trial on the merits. The judicial system could not function in that manner. An error which can be cured must be raised timely, or it is waived. Each of the alleged errors raised in Grynbergs' Petition, if valid, could have been cured before trial; each was therefore waived.

This case is not similar to *Phillips Petroleum Co. v. Shutts.* In *Phillips,* the issue of jurisdiction of the state court over the non-resident class members was timely litigated in the trial court; in direct contrast, the issue

was first raised in this case before the appellate court after all appellate briefs had been filed. Moreover, each class member appeared before the trial court by filing verified answers to interrogatories and thus acknowledged the jurisdiction of the trial court; and each class member ratified the judgment by filing a verified proof of claim based on his or her interest in the judgment in the Bankruptcy Court.

Grynbergs failed to timely raise the contention that the law of the states of residence of the class members should have been applied to their respective claims, and therefore waived the contention even if it were meritorious. Such contention must be raised timely to permit the parties to respond and, if appropriate, to argue the disputed facts pursuant to the law which the trial court determines to be applicable at the time of trial.

Grynbergs also waived any claim that the notice sent to the members of the class was not adequate. They proceeded through trial and to judgment without objection to the original certification and the original notice sent to all members of the class. The defendant cannot object to the form of pre-trial notification to the class after judgment has been rendered in favor of the class; a defendant cannot reasonably contend that the members of the class have been denied due process in obtaining a judgment which each class member has ratified and seeks to affirm.

The decision of the California Court of Appeal in this action did not create lack of uniformity of decision. The Court of Appeal denied the motion to dismiss the action as to the non-resident class members without opinion. The Court's decision that the claims of inadequate notice and

improper choice of law had been waived, since neither claim was timely raised in the trial court, is in conformity with long-standing California, as well as federal, law.

Grynbergs' Petition for a Writ of Certiorari should therefore be denied.

June 13, 1985

Respectfully submitted,

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